PUBLIC VERSION

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA,	)	
Complainant,	)	**Proceeding No.: 20-293** **Bureau ID No.: EB-20-MD-004**
v.	)	
DUKE ENERGY PROGRESS, LLC,	)	
Defendant.	)	

DUKE ENERGY PROGRESS, LLC'S OPPOSITION TO AT&T'S APPLICATION FOR REVIEW

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SUMMARY OF THE ARGUMENT

AT&T's application for review deals in both a fundamental misunderstanding of the law and an alternate universe of facts. From the outset of this dispute, this has been the barrier to productive discussions between the parties. And despite that the Bureau favored AT&T with a massive going-forward rate reduction, AT&T still wants more. AT&T's application for review is, in a nutshell, another chapter in the same work of fiction.

AT&T leads-off by arguing that DEP was under a unilateral obligation to adjust the JUA rates at some unspecified point in the past. Though this incorrect argument is innocuous insofar as it is disconnected from any issues squarely raised in the application for review, it is a telling prelude for an application chock-full of legal inaccuracies and alternative facts.

AT&T next argues that the Bureau erred in finding that the JUA provides AT&T with net material benefits. AT&T's argument relies almost exclusively on its policy preferences rather than any legitimate evidentiary exception to the Bureau's finding. For example, AT&T argues that the "new telecom rate presumption" applies to periods governed by the 2011 Order, even though the 2018 Order expressly states otherwise; AT&T argues that its contractual rights under the JUA should be compared to the extracontractual rights of its purported competitors, even though: (a) the Commission has expressly stated otherwise; and (b) DEP has no control over how Congress or the Commission treats other attaching entities. The Bureau correctly found that the JUA provides AT&T with net material advantages and correctly rejected application of the New Telecom Rate.

AT&T then argues that it was DEP's burden not only to prove that the JUA provided AT&T with net material benefits, but also to justify any rate above the New Telecom Rate through some form of cost quantification. This is not and has never been the standard. AT&T's wild claim is made worse by the fact that AT&T completely ignored its own burden of proof with respect to the periods governed by the 2011 Order. Commission precedent makes abundantly clear that, for periods governed by the 2011 Order, AT&T bore the burden of producing "evidence showing that the monetary value of those advantages is less that the difference between the Agreement Rates and the New or Old Telecom Rates over time."

AT&T next argues that the Bureau erred in accepting DEP's data regarding the average number of attaching entities ("AAE") on poles occupied by AT&T. AT&T, though, does not point to any contrary data or attribute an analytical error to the Bureau. Instead, AT&T argues that because DEP uses the Commission's presumptive AAE to calculate the New Telecom Rate it charges other attaching entities, it cannot use a different AAE to calculate AT&T's rate under the Old Telecom Rate formula. This argument is "tilting at a windmill" because the New Telecom Rate formula's cost allocator is intentionally designed to neutralize the AAE input.

Finally, AT&T argues that rate relief should be the only adjustment to the JUA. This is inconsistent with Commission precedent, inconsistent with the Bureau's order, and inconsistent with legitimate business expectations. If the most DEP can recover is the Old Telecom Rate, then some of the "goodies" in the JUA—including but not limited to the enormous benefit of tabulated costs—must come out in order to ensure fairness to DEP's ratepayers and AT&T's competitors. The Commission should deny AT&T's application for review.

Duke Energy Progress, LLC ("DEP") submits this opposition to the application for review ("Application") filed by BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina ("AT&T") on October 21, 2021 in the above-captioned proceeding. For the reasons set forth below, the Commission should deny AT&T's Application.

ARGUMENT

I. THE BUREAU PROPERLY HELD THAT AT&T IS NOT ENTITLED TO THE NEW TELECOM RATE.

A. DEP Was Not Legally Obligated to Unilaterally Lower AT&T's "Rate."

AT&T opens its Application by stating that "Electric utilities are required by statute to charge cable and telecommunications providers 'just and reasonable' pole attachment rates,"[1] as if to suggest that DEP was under a legal obligation to unilaterally revise the "rates" under the JUA regardless of whether AT&T actually requested a rate adjustment. While this incorrect statement of law is not tied to any particular issue raised in AT&T's Application, it provides a direct view into AT&T's fundamental misunderstanding of the law. Electric utilities are not, and have never been, either obligated or authorized to unilaterally revise the "rate" or rate methodology within a joint use agreement. AT&T's misunderstanding of the complaint-based nature of the Commission's regulation of ILEC pole attachments, particularly as it relates to periods governed by the 2011 Order, courses through the veins of this entire dispute.

B. The "New Telecom Rate Presumption" Does Not Apply to Rental Periods Preceding the Effective Date of the 2018 Order.

AT&T, in arguing that the Enforcement Bureau should have applied the 2018 Order (and the "new telecom rate presumption") to "all rental periods at issue," states:

> The Commission did not carve complaint proceedings into different time periods subject to different standards when it adopted the presumption; it adopted the presumption without temporal limitation to simplify disputes and accelerate rate

[1] AT&T's Application at 3.

> reductions. By regulation, the presumption applies to an entire "complaint proceeding[] challenging utility pole attachment rates" under a newly renewed JUA. 47 C.F.R. § 1.1413(b). and it should have applied to all rental periods at issue here.[2]

AT&T ignores the fact that the Commission **did** "carve complaint proceedings into different time periods subject to different standards." The 2018 Order made abundantly clear that: (1) the "new telecom rate presumption" only applies to "newly-negotiated and newly-renewed" agreements following the effective date of the 2018 Order: and (2) the 2011 Order governs all "rental periods" preceding a "renewal" under the 2018 Order.[3] And if there was any doubt about whether the "new telecom rate presumption" applied retroactively to rental periods preceding the effective date of the 2018 Order, the Commission's *Verizon Maryland Decision* laid those doubts to rest.[4]

AT&T's intransigence on this issue not only prevented the parties from resolving this dispute during pre-complaint negotiations but also caused AT&T to completely ignore its burden

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[2] *Id.* at 4 n.12.

[3] *See Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7770 at ¶ 127 (Aug. 3. 2018) (the "*2018 Order*") ("We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements.... We recognize that this divergence from past practice will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements."); *id.* at 7770, ¶ 127 n.475 ("A new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after the effective date of this Order...."); *id.* at 7770, ¶ 127 n.478 ("Until that time [i.e., renewal of an existing agreement], the *2011 Pole Attachment Order's* guidance regarding review of incumbent LEC pole attachment complaints will continue to apply. Because our intention is to encourage broadband deployment going forward, **we decline to adopt USTelecom's proposal that we give incumbent LECs 'the right to refunds as far back as the statute of limitations allows.**'") (internal citations omitted) (emphasis added).

[4] *See generally, Verizon Md. LLC v. Potomac Edison Co.*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607 (Nov. 23, 2020) (the "*Verizon Maryland Decision*") (applying the 2011 Order to ILEC's claim for refunds of payments made prior to the effective date of the 2018 Order).

of proof under the 2011 Order, which governs the vast majority of AT&T's refund claim.[5] As explained more fully in DEP's October 21, 2021 petition for reconsideration,[6] in order to recover refunds for rental periods governed by the 2011 Order, AT&T was required to produce evidence "showing that the monetary value of [the advantages it enjoys under the JUA] is less than the difference between the [JUA rates] and the New or Old Telecom Rates over time."[7] And, as the Bureau expressly found, AT&T did not provide "a credible valuation of the advantages that AT&T receives under the JUA."[8]

C. The Bureau Did Not Rely on AT&T's "Immutable Characteristics" as an ILEC to Find that AT&T Is Not Entitled to the New Telecom Rate.

AT&T argues that the Bureau "undercut" the "new telecom rate presumption" by finding AT&T was not "similarly situated" to other attachers because of its "immutable characteristics" as an ILEC.[9] AT&T contends that the following benefits under the JUA are actually "immutable characteristics" of ILECs and cannot be used to rebut the "new telecom rate presumption": (1) AT&T's right to guaranteed access to DEP's poles under the JUA; (2) AT&T's right to maintain its attachments on existing joint use poles following termination of the JUA; and (3) AT&T's right to occupy the lowermost portion of usable space on DEP's poles.[10] There is a gaping hole in

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[5] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5333-37 at ¶¶ 214-19 (Apr. 7, 2011) (the "*2011 Order*"). The Bureau found that the 2011 Order governed the rental periods spanning from September 1, 2017 to December 31, 2019. *See* Order at ¶ 15 ("[T]he *2018 Order* provides the relevant standard for review of the JUA for the period starting January 1, 2020...."); *see id.* at ¶ 63 ("AT&T is entitled to a refund for the period beginning on September 1, 2017....").

[6] *See* DEP's Petition for Reconsideration at 1-4 (filed Oct. 21, 2021).

[7] *Verizon Fla. LLC v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140, 1149-50 at ¶ 24 (Feb. 11, 2015) (the "*Verizon Florida Decision*").

[8] *See* Order at ¶ 47.

[9] *See* AT&T's Application at 4.

[10] *See id.* at 4-5.

AT&T's argument: the Commission has explicitly found that each of these benefits **can** be used to rebut the "new telecom rate presumption."[11] AT&T's attempt to reframe these obvious competitive advantages as nothing more than vestiges of its status as an ILEC reveals AT&T's anti-competitive motive. For AT&T, this dispute was never about achieving competitive neutrality—it was always about maintaining the enormous competitive advantages of the JUA while drastically undercutting the financial consideration supporting the JUA. AT&T's Application is more of the same.

Moreover, AT&T's argument relies on the premise that "net material advantages cannot stem from an ILEC's 'historic status as an [I]LEC.'"[12] Why not? From the perspective of competitive neutrality, the origins of AT&T's competitive advantages over DEP's CATV and CLEC licensees should not matter. This was, after all, the entire premise of the 1996 Act—that ILECs have inherent advantages over their competitors (many of which derive from joint use agreements). The Commission adopted the Old Telecom Rate (first as a "reference point" and later has a "hard cap") to "account for particular arrangements that provide net advantages to [ILECs] relative to cable operators and telecommunications carriers."[13] Against this backdrop, all

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[11] *See* 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128 ("Utilities can rebut the presumption we adopt today in a complaint proceeding by demonstrating that the [ILEC] receives net benefits that materially advantage the [ILEC] over other telecommunications attachers. Such material benefits may include…guaranteed space on the pole; preferential location on pole…."); *Verizon Maryland Decision*, 35 FCC Rcd at 13614-15 (finding that right to remain attached on existing joint use poles following termination of JUA and right to guaranteed space on joint use poles provided ILEC with "material advantages over [CLEC and CATV] attachers on the same poles"); *BellSouth Telecomms., LLC d/b/a AT&T Fla. v. Fla. Power and Light Co.*, Memorandum Opinion and Order, Proceeding No. 19-187, 35 FCC Rcd 5321, 5328-29, ¶ 14 (May 20, 2020) (the "*FPL I Decision*") (finding that right to guaranteed space on joint use poles and right to lowest position on joint use poles provided ILEC with competitive advantage over other attachers on the same poles).

[12] AT&T's Application at 4 (emphasis in original) (citing Letter Order at 4, *Verizon Md. LLC v. Potomac Edison Co.*, Proceeding No. 19-355 (May 22, 2020)).

[13] 2011 Order, 26 FCC Rcd at 5337, ¶ 218.

sources of an ILEC's competitive advantages seem material. AT&T's premise also undermines its argument that the Bureau erred by not analyzing the rights of CATVs and CLECs under Section 224 when determining whether the JUA provided AT&T with net competitive advantages. In essence, AT&T is arguing that—with respect to AT&T—the Bureau should only consider advantages that can be traced directly to the black letter of the JUA, while arguing that—with respect to CATVs and CLECs—the Bureau should wholistically consider all advantages, regardless of whether they stem from their pole license agreements with DEP. This framework is self-serving and anti-competitive.

D. The Bureau Properly Compared AT&T's Rights Under the JUA Against the Contractual Rights of DEP's CATV and CLEC Licensees.

AT&T argues that the Bureau erred by comparing "only the '*contractual* rights and responsibilities' of AT&T and its competitors, while expressly dismissing acknowledged statutory and regulatory rights and responsibilities."[14] In particular, AT&T takes issue with the following finding in the Order:

> Although competitive attachers have a statutory right of nondiscriminatory access to a utility's poles under section 224(f)(1), as we held in *AT&T v. DEF*, any discussion of such a right is outside the scope of the present analysis, which necessarily compares the *contractual* rights and responsibilities of AT&T under the JUA with those of AT&T's competitors under their respective license agreements with Duke.[15]

As pointed out by the Bureau, "[t]here is no indication in the *2018 Order* that the Commission intended application of section 1.1413(b) to involve a comparison between statutory rights granted by Congress and negotiated rights granted by agreement."[16] Rather, the 2018 Order and subsequent Commission authority make clear that the "net material benefits" analysis should be

[14] AT&T's Application at 5-6 (italics in original).
[15] Order at ¶ 23 (italics in original).
[16] *Id.* at ¶ 23 n.70.

done on a contract-to-contract basis.[17] Comparing AT&T's contractual rights to the extracontractual statutory and regulatory rights of DEP's CATV and CLEC licensees would be comparing apples and oranges. Moreover, DEP has no control over the statutory and regulatory rights of the various entities attached to its poles: DEP can only exercise control over the contractual rights and responsibilities within its various joint use and pole license agreements. Stated otherwise, the favor with which Congress and the Commission treats various types of attaching entities cannot be "held against" DEP.

E. The Bureau Properly Found that DEP Rebutted the "New Telecom Rate Presumption" for the Period Governed by the 2018 Order.

AT&T argues that the "Bureau Order absolves Duke Progress of its burden to prove relevant net material competitive advantages 'by clear and convincing evidence.'"[18] Specifically, AT&T disputes the Bureau's findings that the following provisions within the JUA provide AT&T with a competitive advantage over other attaching entities: (1) contractual right of guaranteed access; (2) right to maintain existing attachments on DEP's poles following termination of the JUA; (3) the ability to occupy additional space on DEP's poles at no additional charge; (4) the right to predicable, "scheduled cost" billing for pole replacements; (5) avoidance of inspection and permitting costs; and (6) right to the lowest position on DEP's poles.[19] AT&T's arguments with

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[17] *See* 2018 Order, 33 FCC Rcd at 7768, ¶ 124 (noting that "**joint use agreements** may provide benefits to the [ILECs] that are not typically found in **pole attachment agreements** between utilities and other telecommunications attachers") (emphasis added); *Verizon Maryland Decision*, 35 FCC Rcd at 13615-16, ¶ 20 & nn.60-69 (comparing the rights afforded to the ILEC under the joint use agreement against the rights afforded to the electric utility's CATV and CLEC licensees under pole license agreements to determine whether the ILEC's rights under the JUA provided it with a competitive advantage).

[18] AT&T's Application at 6. AT&T's analysis fails to distinguish between the rental periods governed by the 2011 Order and the rental periods governed by the 2018 Order. AT&T's analysis, once again, improperly implies that the 2018 Order—along with its "new telecom rate presumption"—applies to all rental periods at issue.

[19] *See id.* at 8-15.

respect to each material benefit are addressed separately below.

1. Contractual Right of Access.

AT&T claims that its contractual right of access under the JUA places it at a "material disadvantage" vis-à-vis DEP's CATV and CLEC licensees.[20] AT&T's argument, however, is nothing more than a recitation of its earlier argument that the Bureau erred by not comparing AT&T's **contractual** rights with the **statutory** rights of DEP's CATV and CLEC licensees under Section 224. As explained in Section I.D. *supra*, the Bureau was bound by the 2018 Order and *Verizon Maryland Decision* to perform a contract-to-contract analysis. Further, even though its analysis was supposed to be limited to a contract-to-contract comparison, the Bureau **did** compare AT&T's access rights under the JUA with the statutory right of access afforded to CATVs and CLECs. While no formal findings were made, the Bureau's analysis (based on the record evidence before it) suggests that it did not view AT&T's access rights under the JUA as inferior to the access rights afforded under Section 224.[21]

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[20] *Id.* at 8. AT&T even goes so far as to argue that "Duke Progress admitted 'ILECs are at a material *disadvantage* compared to CLECs and CATVs.'" *See id.* at 7 (citing DEP's Answer at Exh. E, DEP000329 (Decl. of Kenneth Metcalfe, CPA, CVA, Nov. 12, 2020 ("Metcalfe Decl.") ¶ 9)). In making this argument, AT&T grossly mischaracterizes the testimony of DEP's expert witness Kenneth Metcalfe. Mr. Metcalfe's testimony actually provides: "[DEP] is required by the FCC to provide mandatory access to CLECs and CATVs, but is not required to provide mandatory access to AT&T, in those areas where AT&T is the ILEC. This represents a fundamental difference between CLECs or CATVs, as compared to ILECs. **Without a contractual obligation for a utility to provide access, such as the terms in the JUA**, ILECs are at a material disadvantage compared to CLECs and CATVs." DEP's Answer at Exh. E, DEP000329 (Metcalfe Decl. ¶ 9) (emphasis added). The absence of a statutory right of access magnifies, rather than minimizes, the value of a contractual right of access.

[21] *See, e.g.*, Order at ¶ 17 ("The JUA specifically requires Duke to reserve and maintain for AT&T space on all joint use poles, including any that are newly erected or newly acquired. AT&T's competitors are not guaranteed space on any pole to which they are not already attached and [redacted] Further, several of Duke's license agreements provide that Duke [redacted]

2. Right to Remain Attached Following Termination.

AT&T argues that its right to remain attached to DEP's poles following termination of the JUA does not provide it with a competitive advantage because "AT&T's CLEC and cable competitors enjoy the permanent statutory right to access Duke Progress's poles that is unavailable to AT&T."[22] Once again, AT&T is comparing apples and oranges. As explained in Section I.D. *supra*, this argument is without merit because the Bureau was bound by the 2018 Order and the *Verizon Maryland Decision* to perform a contract-to-contract analysis.

Adhering to the Commission's guidance in the *Verizon Maryland Decision*, the Bureau correctly compared AT&T's express right to remain attached following termination of the JUA with the "removal upon termination" provisions within the pole license agreements executed by DEP's CATV and CLEC licensees.[23] AT&T further disputes the Bureau's contract-to-contract analysis by arguing that the "removal upon termination" provision within DEP's pole license agreements is unenforceable.[24] AT&T's argument ignores the *Verizon Maryland Decision*, wherein the Commission determined that an ILEC's right to remain attached following termination provided it with a competitive advantage over CATVs and CLECs, whose license agreements required them to remove their attachments within a specified time after termination.[25] AT&T's

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[redacted]); *id.* at ¶ 23 n.69 ("Notwithstanding AT&T's claim that Duke's licensees enjoy 'guaranteed statutory access,' we note that the right of access provided to [CLECs and CATVs] under section 224(f)(1) is subject to a list of specific exclusions in section 224(f)(2).") (citations omitted).

[22] AT&T's Application at 9.

[23] *See* Order at ¶ 21 & nn.65-66.

[24] *See* AT&T's Application at 9 n.41 ("AT&T's competitors have the right to maintain their existing attachments on Duke Progress's poles after their license agreements are terminated **regardless of what the agreements say**.") (emphasis added).

[25] *See Verizon Maryland Decision*, 35 FCC Rcd at 13615, ¶ 20 & nn.64-65; *see also BellSouth Telecommunications, LLC d/b/a AT&T Fla. v. Duke Energy Fla., LLC*, Memorandum Opinion and Order, Proceeding No. 20-276, 2021 FCC LEXIS 3240, at *45, ¶ 28 (Aug. 27, 2021) ("In order

"unenforceability" argument also ignores the fact that AT&T's own pole license agreements include "removal upon termination" provisions.[26] In any event, if AT&T's arguments depend on an adjudication regarding the enforceability of a provision within a third-party agreement, then AT&T is grasping at straws.

AT&T's arguments seem designed to obscure the enormous value AT&T derives from its right to remain attached following termination. This provision of the JUA, in essence, gives AT&T a unilateral option on a perpetual license to remain attached to 148,064 DEP poles **indefinitely**, which allows AT&T to avoid the need for an alternate deployment solution in the event of a termination. According to the testimony of DEP's valuation expert, Kenneth Metcalfe, "this is a significant and fundamental contractual benefit" that provides AT&T with an annualized net benefit of [redacted], or [redacted] per pole.[27]

3. Right to Use Additional Space at No Additional Charge.

AT&T argues that its right to use additional space on DEP's poles at no additional charge "does not materially or competitively advantage AT&T because its competitors are similarly situated."[28] This is because, AT&T contends, neither the JUA nor DEP's license agreements with CATVs and CLECs restrict the amount of space that an attacher may occupy.[29] AT&T is attacking

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for the Commission [in the *Verizon Maryland Decision*] to have found that the absence of a 'removal upon termination' provision from the joint use agreement there provided a material advantage to the [ILEC], it necessarily viewed the license agreements' 'removal upon termination' provisions, at least as a general matter, as enforceable.").

[26] *See, e.g.*, AT&T's Stand-Alone 20-State Structure Access Agreement for Poles, Conduits, and Rights-of-Way, Section 28.3 ("Attaching party shall remove its facilities from AT&T's poles, ducts, conduits, or rights-of-way within sixty (60) days after termination of the occupancy permit."). AT&T's Structure Access Agreement can be accessed through the following URL: https://dms.psc.sc.gov/Web/Dockets/Detail/116243.

[27] DEP's Answer at Exh. E, DEP000334 (Metcalfe Decl. ¶¶ 20-21).

[28] AT&T's Application at 10.

[29] *See id.*

a straw man. By focusing solely on whether CATVs and CLECs can occupy more than one foot of space on DEP's poles, AT&T ignores the critical distinction between the JUA and DEP's CATV and CLEC license agreements—that AT&T's "rate" is not predicated on the amount of space it uses. DEP's CATV and CLEC licensees, on the other hand, pay a "per attachment rate premised on a single foot of occupancy."[30]

AT&T attempts to bolster its argument by stating that the "*Bureau Order* also does not account for the fact that federal law guarantees AT&T's competitors (but not AT&T) as much space as they require, limited only by the same narrowly construed conditions."[31] Setting aside the fact that AT&T is attempting to draw an inappropriate comparison between AT&T's contractual rights and the statutory rights of DEP's CATV and CLEC licensees, this evidences a deep misunderstanding of Section 224. CATVs and CLECs are **not** guaranteed space on any DEP pole. Instead, CATVs and CLECs take the pole as they find it. If a particular pole does not have any spare capacity, DEP is under no obligation to expand capacity to accommodate a proposed CATV or CLEC attachment. Therefore, AT&T's statement that "the law requires [CATVs and CLECs] be given the space they need" is patently incorrect.[32] This is a right that AT&T, alone, enjoys under the JUA.[33] In any event, as set forth above, if a CATV or CLEC occupies more

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[30] DEP's Initial Brief in Response to the Enforcement Bureau's March 8, 2021 Letter at 11 & n.47 (filed Apr. 8. 2021) ("DEP's Initial Brief"); *see also* DEP's Answer at Exh. A, DEP000249 (Decl. of Scott Freeburn, Nov. 13, 2020 ("Freeburn Decl.") ¶ 10) ("The rental rate under a pole license agreement is typically a per attachment rate, rather than a per pole rate."); *Tex. Cablevision Co. v. Sw. Elec. Power Co.*, Memorandum Opinion and Order, PA-94-0007, 1985 FCC LEXIS 3818, at *4-5, ¶ 6 (Feb. 26, 1985) ("[T]he maximum rate determined by the Commission is on a per-attachment basis. Thus, if the cable company has multiple cable attachments…on a pole, the utility may charge for each individual cable attachment.").

[31] AT&T's Application at 11.

[32] *Id.*

[33] The JUA requires DEP to expand capacity at AT&T's request. *See* DEP's Answer at Exh. 1, DEP000122 (JUA, Art. VII.A) ("[W]henever any Jointly Used pole, or any pole about to be so used under the provisions of this Agreement, is insufficient in size or strength for both the existing

space, it pays for more space—unlike AT&T which pays the same per pole rate regardless of whether it occupies 3 feet of space or 5 feet of space.

4. Benefit of "Tabulated Cost" Billing.

AT&T argues that that the "tabulated cost" (a/k/a "scheduled cost") provision of the JUA "provide[s] no real world advantage to AT&T."[34] In making this argument, AT&T claims that DEP "created an artificial difference by comparing the lowest cost pole replacement under the JUA to Duke Progress's average cost to replace poles of all heights *and* to complete all associated work."[35] First, the "lowest cost pole replacement" actually covers all poles 50 feet or less in height.[36] Second, based on AT&T's Application and witness testimony, the "associated work" to which AT&T refers is the cost of transferring DEP's facilities to the replacement pole.[37] In other words, AT&T is apparently arguing that a "tabulated cost" versus "actual work order cost"

Attachments and the proposed additional Attachments by the Owner Or Licensee..., the Owner shall promptly replace such pole with a new pole of the necessary size or strength, and make such other changes in the existing pole line in which such pole is included, as may be made necessary by the replacement of such pole and the placing of the Licensee's circuits as proposed."). Moreover, unlike DEP's CATV and CLEC licensees, AT&T is only required to pay [redacted] of the cost DEP incurs in replacing an existing pole with a taller, stronger pole capable of hosting AT&T's proposed attachment. *See id.* at Exh. A, DEP000256 (Freeburn Decl. ¶ 24); *see also infra* Section I.E.4.

[34] AT&T's Application at 12.

[35] *Id.* at 12 n.56.

[36] *See* DEP's Answer at Exh. 5, DEP000178 (Exhibit B Cost Schedule, Table 1).

[37] *See* AT&T's Application at 12 n.56 (citing DEP's Answer at Exh. E, DEP000338 (Metcalfe Decl. ¶ 30 n.48) (stating that "equipment transfer costs" are a "significant component of the total cost" of performing pole replacements); AT&T's Reply Legal Analysis at Exh. D, ATT00415-16 (Decl. of Nea K. Dalton, Dec. 18, 2020, ¶ 10) ("The reason that Mr. Freeburn says actual costs are higher is because he adds costs for additional work when describing a 'pole replacement.' For example, Exhibit B sets the cost to 'replace pole,' which is the replacement cost for the pole itself. **Mr. Freeburn compares that replacement pole cost to the combined costs to replace the pole *and* complete additional transfer work after the pole is replaced**. As a result, he says an average pole replacement was [redacted] in 2019, but that is an extraordinarily excessive cost for the work actually included in the 'replace pole' category of Exhibit B. Mr. Freeburn's comparison is thus misleading and useless.") (italics in original) (bold-underline emphasis added)).

comparison is inappropriate because the "tabulated cost" for a pole replacement does not include equipment transfer costs, whereas the "actual work order cost" does. While AT&T stops short (in any of its pleadings or witness testimony) of actually stating that it is required to bear the cost of transferring DEP's facilities (in addition to the "tabulated cost" for a pole replacement), this is precisely the implication of AT&T's argument.[38] The record evidence and black letter of the JUA reveal AT&T's argument for what it is: misleading innuendo.

DEP submitted witness testimony explaining that, under the "tabulated costs" provision of the JUA, AT&T pays [redacted] of the "actual work order cost" DEP incurs when it performs pole replacements:

> [I]f AT&T needs DEP to replace an existing 40-foot pole with a 45-foot pole—either because it needs more space for additional facilities or because it has caused a violation—then AT&T's cost responsibility is limited to the amount set forth in Table 1 of Exhibit B. The current value in Table 1 of Exhibit B for any pole 50 foot or less is [redacted] *See* Exhibit 5 to DEP's Answer. In contrast, if the same need arises for one of DEP's CATV or CLEC licensees, the CATV or CLEC licensee would be required to pay actual work order cost. In 2019, the average cost of a pole replacement for DEP was [redacted] **This means that, on average AT&T gets a [redacted] discount as compared to CATV and CLEC licensees for the same work.**[39]

The testimony of Scott Freeburn makes clear that this is an apples-to-apples comparison. For precisely the same scope of work, DEP's CATV and CLEC licensees are required to pay "actual work order" costs, which averaged [redacted] in 2019, while AT&T is only required to pay the "tabulated cost" for such work, which currently stands at [redacted]

AT&T's innuendo also contradicts the black letter of the JUA, which insulates AT&T from the cost of transferring DEP's electric facilities:

> Except as otherwise expressly provided herein, **each party shall place, maintain,**

[38] There is a good reason AT&T stopped short of actually testifying that it bears DEP's equipment transfer costs: **it would have been a lie**.

[39] DEP's Answer, Exh. A at DEP000256 (Freeburn Decl. ¶ 24) (emphasis added).

> **rearrange, transfer, and remove its own Attachments at its own expense**, and shall at all times perform such work promptly and in such manner as not to interfere with service being supplied or work being done by the other party.[40]

The JUA also clearly distinguishes between the "actual costs," which includes "transfer costs," and "tabulated costs":

> If within sixty days (60) days after the receipt of a request for revision of the pole charges by either party from the other, the receiving party objects to the revision and the parties fail to agree upon such revision, then the amount to be billed thereafter for such pole work shall be **the actual cost of the work including transfer cost**.[41]

In other words, if the parties cannot agree on adjustments to the "tabulated costs" under the JUA, then the JUA transitions into an "actual cost" framework wherein the amounts billed are the "actual cost of the work **including transfer cost**."

That AT&T devotes a mere four, obfuscatory sentences to the "tabulated cost" provision of the JUA speaks volumes—AT&T does not want to draw the Bureau's attention to the enormous value AT&T derives from the "tabulated costs" provision. On average, "AT&T gets a [redacted] discount as compared to CATV and CLEC licensees" for make-ready pole replacements.[42] Put another way, AT&T pays [redacted] of what its CATV and CLEC competitors do for make-ready pole replacements.

5. Avoidance of Permitting Costs.

AT&T claims that the Bureau erred in finding that the avoidance of DEP's permitting requirements (and their attendant costs) provided it with a competitive advantage.[43] Specifically, AT&T argues that it does not actually avoid permitting costs because it "incurs the costs by

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[40] DEP's Answer at Exh. 1, DEP000122 (JUA, Art. VI) (emphasis added).
[41] *See id.* at Exh. 1, DEP000125-26 (JUA, Art. VII.K) (emphasis added).
[42] *Id.* at Exh. A at DEP000256 (Freeburn Decl. ¶ 24).
[43] *See* AT&T's Application at 12-14.

performing the work itself."[44] This is pure evasion. As explained by Scott Freeburn, the avoidance of DEP's permitting requirements provides AT&T with a huge advantage over CATVs and CLECs on the same poles:

> Unlike DEP's CATV and CLEC licensees, AT&T is not required to submit a permit when making a new attachment. CATV and CLEC licensees must submit an application to attach to DEP's poles, pay the costs associated with that application incurred by DEP, including inspection costs, and wait for their application to be processed in accordance with FCC timelines prior to attaching. AT&T, on the other hand, can attach without submitting a permit to DEP, without paying the costs associated with such an application, and without waiting any period of time for DEP to perform each of the steps in the permitting process (including review of the application, survey, make-ready engineering) and to approve, conditionally approve subject to make-ready requirements, or deny AT&T's application.[45]

Further, while AT&T's attachments are exempt from DEP's permitting requirements, DEP still performs the same post-construction inspections on AT&T's attachments as it performs for CATV and CLEC permit applications.[46] However, unlike DEP's CATV and CLEC licensees, AT&T is not charged for post-construction inspections—DEP absorbs those costs.[47] Regardless of what types of work AT&T chooses to perform prior to making its attachments to DEP's poles, the ability to avoid DEP's permitting requirements and post-construction inspection costs altogether is an incredibly valuable benefit. In fact, according to DEP witness Kenneth Metcalfe, this provision alone provides AT&T with an annualized net benefit of [redacted], or [redacted] per pole.[48]

While the Bureau correctly found that the avoidance of DEP's permitting requirements

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[44] *See id.* at 12.

[45] DEP's Answer at Exh. A, DEP000254 (Freeburn Decl.¶ 20); *see also* DEP's Answer at ¶ 17 ("Given the incredible amount of attention the Commission has devoted over the past decade to streamlining attachment and overlashing processes (not to mention the amount of effort attaching entities have put into advocating for these changes), it is unfathomable that AT&T would argue that their ability to avoid [DEP's permitting requirements] altogether is immaterial.").

[46] *See id.* at Exh. A, DEP000254-55 (Freeburn Decl. ¶ 21).

[47] *See id.*

[48] *See id.* at Exh. E, DEP000336-37, DEP000377 (Metcalfe Decl. ¶¶ 25-27, Exh. E- 4.2).

provides AT&T with a competitive advantage, the Bureau erred by discounting this advantage when analyzing whether the advantages under the JUA justify the "rates" under the JUA.[49] Specifically, the Bureau stated: "Because Duke fails to identify the inspections or engineering work that it purportedly performs on AT&T's behalf under the JUA, let alone the avoided cost savings to AT&T, we do not find that the JUA benefits AT&T with regard to avoided inspection and engineering costs."[50] This statement is not only at odds with the Bureau's finding in paragraph 28 of the Order (i.e., that "AT&T is not required to obtain prior authorization or pay permitting fees" while "[i]ts competitors must obtain such authorization from Duke and pay a permitting fee for all such attachments"), but it also ignores the record evidence in this case. In its answer, DEP provided both an explanation of the engineering and inspection costs avoided by AT&T, as well as a valuation of the benefit of those avoided costs to AT&T.[51]

AT&T also argues that it performs the "relevant permitting work under disadvantageous conditions, as the JUA does not guarantee timely make-ready when other attachers must modify…their facilities before AT&T can attach its facilities to Duke Progress's poles."[52] AT&T is once again attempting to draw a comparison between AT&T's contractual rights under the JUA and the extracontractual rights CATVs and CLECs have under the Commission's pole attachment regulations. As explained in Section I.D. *supra*, Commission authority requires a contract-to-

[49] *Compare* Order at ¶¶ 28-30 *with id.* at ¶¶ 34, 46.

[50] *See id.* at ¶ 34.

[51] *See* DEP's Answer at Exh. A, DEP000254 (Freeburn Decl. ¶¶ 20) (explaining that, unlike DEP's CATV and CLEC licensees, AT&T is exempt from DEP's permitting requirements and "can attach without submitting a permit to DEP, without paying the costs associated with such an application, and without waiting any period of time for DEP to perform each of the steps in the permitting process"); *see id.* at Exh. A, DEP000267 (Freeburn Decl. Exh. A-2) (setting forth the fees and costs associated with DEP's permitting requirements); *id.* at Exh. E, DEP000336-37, DEP000377 (Metcalfe Decl. ¶¶ 25-27, Exh. E- 4.2).

[52] AT&T's Application at 13.

contract analysis. AT&T's argument is irrelevant anyway because the make-ready timelines within the Commission's pole attachment regulations have no bearing on whether AT&T's avoidance of permitting costs (the benefit at issue) provides it with a competitive advantage.

6. Right to Lowest Position on DEP's Poles.

AT&T also disputes the Bureau's finding that the right to occupy the lowest position on DEP's poles provides AT&T with a competitive advantage.[53] The primary thrust of AT&T's argument is that occupying the lowest position on a pole is actually a "competitive disadvantage" for AT&T—an argument the Bureau rejected based on the weight of the evidence.[54] But AT&T's argument, once again, ignores all of the benefits AT&T derives from occupying the lowest position in the communications space on DEP's poles—benefits that have repeatedly been found to provide a competitive advantage over other attaching entities.[55]

AT&T attempts to bolster its argument by claiming that its right to occupy the lowest position on DEP's poles "resulted from decades of history rather than affirmative decision-making."[56] But the record clearly shows that AT&T's position on DEP's poles was the product of arm's length negotiations and that AT&T "never sought to abandon its right to the lowest position in the communications space."[57] Thus, as the Bureau acknowledged, "AT&T's position on the

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[53] *See id.* at 14-16.

[54] *See* Order at ¶¶ 31-33.

[55] *See, e.g.*, DEP's Answer at ¶ 19; *id.* at Exh. A, DEP000253-54 (Freeburn Decl. ¶ 19); *id.* at Exh. C, DEP000300 (Decl. of Steven Burlison, P.E., Nov. 13, 2020 ("Burlison Decl.") ¶ 17); DEP's Initial Brief at 12-14; 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128 (characterizing "preferential location" on poles as a material benefit); *Verizon Florida Decision*, 30 FCC Rcd at 1148, ¶ 21 (finding that JUA's allocation of *lowest* four feet of usable space provides ILEC with competitive advantage); *FPL I Decision*, 35 FCC Rcd at 5328-29, ¶ 14 (describing benefits ILEC enjoyed from occupying the lowest position on the pole).

[56] AT&T's Application at 14-15.

[57] *See* DEP's Response to AT&T's Initial Brief in Accordance with the Enforcement Bureau's March 8, 2021 Letter at 5 (filed Apr. 19, 2021); DEP's Answer at Exh. 1, DEP000121 (JUA, Art. III.B) ("The parties agree that all existing Attachments to poles used jointly by the parties shall

pole is by choice and that choice has benefitted AT&T by providing a consistent and predictable space on each pole in a position of its choosing."[58]

II. THE COMMISSION SHOULD REJECT AT&T'S ARGUMENT THAT DEP MUST JUSTIFY THE "HARD CAP" OLD TELECOM RATE THROUGH COST QUANTIFICATION.

AT&T takes issue with the Bureau's finding that DEP is entitled to the Old Telecom Rate and argues that DEP should have been required to justify any variation from the New Telecom Rate with cost data:

> While the *Bureau Order* correctly states that an electric utility can charge a rate "that *does not exceed* the Old Telecom Rate" where a JUA provides the ILEC with net material competitive benefits, it also refers to the old telecom rate as *the* lawful rate without quantifying (or requiring Duke Progress to quantify) the value of any of the identified advantages. But the old telecom rate is an upper bound, *not* a presumptive just and reasonable, or an automatically applied, rate, even if an ILEC receives net material competitive benefits. Any upward variation from the new telecom rate must be justified based on relevant costs, as an electric utility cannot lawfully recover "costs that [it] does not incur."[59]

There are a host of problems with AT&T's argument.

The most glaring problem is that AT&T is creating a new legal standard out of whole cloth. AT&T's contention that "[a]ny upward variation from the new telecom rate must be justified based on relevant costs" is entirely unmoored from the Commission's rules and authority. In the 2011 Order, the Commission designated the Old Telecom Rate as a "reference point in complaint proceedings" regarding new agreements because, "[a]s a higher rate than the regulated rate available to telecommunications carriers and cable operators, **it helps account for particular**

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continue to exist in their current condition…and nothing contained herein shall be construed as requiring either party to…rearrange any such existing Attachments."); *id.* at Exh. 2, DEP000140 (1977 JUA, Art.I.A.2) (allocating lowermost [redacted] of usable space to AT&T); *id.* at Exh. A, DEP000254 (Freeburn Decl. ¶ 19) (noting that, in 17 years as manager of Duke Energy Corporation's joint use department, AT&T never asked to "assume a higher position on the pole").

[58] Order at ¶ 33.

[59] AT&T's Application at 16-17 (italics in original) (internal citations omitted).

arrangements that provide net advantages to [ILECs] relative to [CATVs and CLECs]."[60] In making the Old Telecom Rate a "hard cap," the 2018 Order "reaffirm[ed] the conclusion that reference to [the Old Telecom Rate] is appropriate **where [ILECs] receive net material advantages in a pole attachment agreement**."[61] The Commission's reliance on the Old Telecom Rate, therefore, was not about recovery of quantified costs; it was a "reference point" and later a "hard cap" that, in the Commission's view, helped to ensure competitive neutrality. Competitive neutrality dictates that ILECs, who enjoy unique, competitive advantages under joint use agreements, pay a higher rate than CATVs and CLECs.[62]

In arguing that DEP must justify "any upward variation from the new telecom rate" with cost data, AT&T cites various Commission precedent that stands for an entirely different (and opposing) proposition—i.e., that competitive neutrality requires an ILEC to pay a higher rate if the ILEC's joint use agreement provides it with competitive advantages over CATVs and CLECs.[63] Moreover, three of the four pieces of authority cited by AT&T are either the 2011 Order itself or cases decided under the 2011 Order and thus predate the Commission's "new telecom rate presumption." And included amongst this authority is the *Verizon Florida Decision*, which required the ILEC (not the electric utility) to quantify the costs it avoided (and the benefits it received) under the joint use agreement:

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[60] 2011 Order, 26 FCC Rcd at 5337, ¶ 218 (emphasis added).

[61] 2018 Order, 33 FCC Rcd at 7771, ¶ 129 (emphasis added).

[62] *See* 2011 Order, 26 FCC Rcd at 5336-37, ¶ 218 ("[I]f a new pole attachment agreement between an [ILEC] and a pole owner includes provisions that materially advantage the [ILEC] *vis a vis* a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently.").

[63] *See* AT&T's Application at 17 n.78 (citing *Verizon Va. LLC v. Va. Elec. and Power Co.*, Order, Proceeding No. 15-190, 32 FCC Rcd 3750, 3759 at ¶ 18 (May 1, 2017); *id.* at 3759, ¶ 20; 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128; *Verizon Florida Decision*, 30 FCC Rcd at 1149-50, ¶ 24; 2011 Order, 26 FCC Rcd at 5336-37, ¶ 218).

> Third, we find that Verizon has adduced insufficient evidence to support a finding that the Agreement Rates are unreasonable, or for the Commission to set a just and reasonable rate. **Verizon concedes that it received and continues to receive benefits under the Agreement that are not provided to other attachers, but it has not produced any evidence showing that the monetary value of those advantages is less than the difference between the Agreement Rates and the New or Old Telecom Rates over time. Verizon provides no evidence regarding the value of access to Florida Power's poles or occupying the lowest usable space on each pole. Verizon likewise made no attempt to estimate the costs Florida Power incurred by installing taller poles to accommodate Verizon. For its 67,000 attachments, Verizon was not required to pay make-ready costs and post-attachment inspection fees that competitive LECs must pay, yet Verizon has made no attempt to quantify the expenses it avoided under the Agreement.** Absent such evidence, we are unable to determine whether the Agreement Rates are just and reasonable. Verizon's raw comparison of the Agreement Rates to the Old and New Telecom Rates is not sufficient to show that the Agreement Rates are unjust.[64]

The only authority AT&T cites that is not governed by the 2011 Order is the 2018 Order, and AT&T unironically cites the passage articulating the actual legal standard:

> Utilities can rebut the presumption we adopt today in a complaint proceeding by demonstrating that the [ILEC] receives net benefits that materially advantage the [ILEC] over other telecommunications attachers.... If the utility can demonstrate that the [ILEC] receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.[65]

The foregoing makes clear that DEP is under no legal burden to quantify the costs it incurs under the JUA: DEP is only required to demonstrate that AT&T receives net material benefits. But as discussed *infra*. DEP actually **did** quantify several of the costs it incurs in providing AT&T with

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[64] *Verizon Florida Decision*, 30 FCC Rcd at 1149-50, ¶ 24 (emphasis added). This language is particularly injurious to AT&T, as it articulates the burden of proof that AT&T was required—but failed—to meet under the 2011 Order, which governs the vast majority of its refund claim. As explained in DEP's petition for reconsideration, AT&T failed to provide any evidence demonstrating that the "monetary value" of the benefits it enjoys under the JUA is less than the difference between the JUA rate and the Old Telecom Rate. *See* DEP's Petition for Reconsideration at 2-4.

[65] 2018 Order, 33 FCC Rcd at 7770-71, ¶ 128.

the material benefits under the JUA. Thus, DEP satisfied even AT&T's fabricated burden of proof.

AT&T also claims that the "identified 'advantages' do not impose costs on Duke Progress."[66] Apart from having no basis in law, AT&T's argument ignores the record here. For example, DEP's valuation expert witness, Kenneth Metcalfe, presented evidence that the annualized net benefit to AT&T for avoiding permitting and inspection costs is [redacted] per pole.[67] Mr. Metcalfe made clear that this benefit corresponded directly to an actual cost, stating that the annualized net benefit per pole was "[e]qual to AT&T's **cost** less Duke Energy Progress' **cost**."[68] Moreover, Mr. Freeburn explained that under the "tabulated cost" provision of the JUA, DEP absorbs the [redacted] of AT&T's make-ready pole replacement costs:

> [I]f AT&T needs DEP to replace an existing 40-foot pole with a 45-foot pole—either because it needs more space for additional facilities or because it has caused a violation—then AT&T's cost responsibility is limited to the amount set forth in Table I of Exhibit B. The current value in Table I of Exhibit B for any pole 50 foot or less is [redacted] In contrast, if the same need arises for one of DEP's CATV or CLEC licensees, the CATV or CLEC licensee would be required to pay actual work order cost. In 2019, the average cost of a pole replacement for DEP was [redacted] This means that, on average AT&T gets a [redacted] discount as compared to CATV and CLEC licensees for the same work.[69]

DEP also presented witness testimony showing that the JUA caused DEP to build a network of poles taller and stronger than necessary for its own use in order to accommodate AT&T:

> [B]ecause of joint use agreements, DEP constructed its pole infrastructure to be of sufficient height and strength to accommodate AT&T's facilities.
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> ...
>
> For example, both the 1977 JUA and the Joint Use Agreement contemplate a 40-foot joint use pole to accommodate electric and telephone facilities, plus the

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[66] AT&T's Application at 17.

[67] *See* DEP's Answer at Exh. E, DEP000336-37, DEP000377 (Metcalfe Decl. ¶ 27, Exh. E-4.2).

[68] *Id.* at Exh. E, DEP000377 (Metcalfe Decl. Exh. E-4.2) (emphasis added); *see also id.* at Exh. A, DEP000254 (Freeburn Decl. ¶ 21) ("[W]hile DEP performs the same post-construction inspections with respect to AT&T's attachments as it performs for CATV and CLEC permit applications, AT&T (unlike CATVs and CLECs) is not charged for that work.").

[69] *See id.* at Exh. A, DEP000256 (Freeburn Decl. ¶ 24).

> required separation space. If DEP had constructed its network in the absence of the Joint Use Agreement, DEP would have built a network only to suit its own service needs; thus, the pole network would have been built with shorter poles. Given that AT&T's allocated space was [redacted] in the 1977 JUA and the typical separation space is 40" (3.33 feet), and given that wood poles come in 5 foot increments, this means DEP, because of the Joint Use Agreement, was on average installing poles that were 5-10 feet taller than necessary to provide electric service.[70]

DEP's installation of taller, stronger (and more expensive) poles in its overlapping service territory with AT&T imposed an enormous cost on DEP—a cost justified only by the cost-sharing provisions of the JUA.[71] The foregoing demonstrates that, even under AT&T's make-believe legal framework, it would be inappropriate for AT&T to pay a penny less than the Old Telecom Rate for its use of DEP's poles during the rental periods governed by the 2018 Order.[72]

III. THE BUREAU PROPERLY ADOPTED DEP's [redacted] AVERAGE NUMBER OF ATTACHING ENTITIES INPUT.

AT&T argues that the Bureau "improperly adopts and applies a unique [redacted] attaching entities input for Duke Progress to use to calculate the rates it charges AT&T—different from the presumptive 5 attaching entities input that applies when calculating rates for AT&T's competitors

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[70] *Id.* at Exh. A, DEP000250 (Freeburn Decl. ¶¶ 11-12); *see also id.* at Exh. B, DEP000285 (Decl. of David Hatcher, Nov. 13, 2020, ¶ 9) ("DEP has always needed to set a pole 5-10 feet taller than necessary for electric service in order to accommodate AT&T's facilities and the safety space."); *id.* at Exh. C, DEP000297-99 (Burlison Decl. ¶¶ 11-16).

[71] Through its rate formulas, the Commission has always acknowledged that pole space has a measurable cost. *See* 47 C.F.R. § 1.1406(d)(1)-(2). Furthermore, previous decisions have recognized that the installation of taller, stronger poles pursuant to a joint use agreement imposes a cost on electric utilities. *See, e.g., Verizon Florida Decision*, 30 FCC Rcd at 1148, ¶ 21; *id.* at 1150, ¶ 24. The Commission has also recognized that, in the absence of the JUA with AT&T, it would have been irrational for DEP to install taller, stronger poles solely in anticipation of potential third-party attachers. *See* 2011 Order, 26 FCC Rcd at 5302, ¶ 144 n.433 ("[I]t would typically not be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and therefore incur unreimbursed capital costs....").

[72] Even though it is AT&T's burden to bear, DEP's valuation of the JUA's benefits more than justifies the "rate" AT&T was required to pay under the JUA for the rental periods governed by the 2011 Order.

to rent space on the same poles."[73] Notably, AT&T does not challenge the Bureau's finding regarding the validity of the underlying data, nor did AT&T present any data to dispute DEP's average number of attaching entities ("AAE") calculation. Instead, the gist of AT&T's argument is that, if DEP uses the Commission's presumptive AAE input to calculate the New Telecom Rate it charges to other attaching entities, DEP cannot use a different AAE input to calculate the rate it charges AT&T.

AT&T's argument ignores the fact that the New Telecom Rate formula, by design, sterilizes the AAE input. This is accomplished through the New Telecom Rate's "cost allocator" function, which is the only distinguishing factor between the New Telecom Rate and Old Telecom Rate formulas. The "cost allocator" in the New Telecom Rate, in essence, negates the component of the Old Telecom Rate that allocates 2/3 of the unusable space equally among the attaching entities on a pole. Therefore, the AAE input is relevant only for purposes of the Old Telecom Rate. Stated otherwise, if the AAE still mattered for purposes of calculating the New Telecom Rate, DEP would most certainly use the actual AAE rather than a presumptive value. Against this backdrop, AT&T's argument is "tilting at a windmill."

The rest of AT&T's argument on this point is incoherent. But to the extent AT&T is arguing that DEP should have developed a system-wide—rather than an AT&T-specific—AAE, AT&T is arguing against its own self-interest. As AT&T could discern from analyzing DEP's system-wide inventory data, the actual system wide AAE (including DEP) on all distribution poles is [redacted][74] An AAE of [redacted] would increase AT&T's rate under the Old Telecom Rate formula by more than [redacted]/pole (based on DEP's current pole cost data). Even if this analysis includes only

[73] AT&T's Application at 19.

[74] *See* DEP's Supplemental Interrogatory Responses at Exh. 3, DEP0001362 (2017 VentureSum Inventory Data).

DEP poles with at least one foreign (i.e., non-DEP) attachment, the system-wide AAE would still be lower ([redacted]) than DEP's AT&T-specific [redacted] figure. If either the [redacted] or [redacted] figure is more palatable to AT&T than the [redacted] figure, DEP is more than willing to use it.

In any event, the Commission has long held that "an attacher is only responsible to pay its Telecom Formula share of the costs of unusable space for the poles to which it is actually attached."[75] For this reason, an AAE based solely on the poles occupied by a specific attacher fits squarely within Commission precedent. That is exactly the way the [redacted] AAE at issue here was calculated—using only those poles occupied by AT&T.

IV. THE BUREAU PROPERLY AND UNAMBIGUOUSLY DIRECTED THE PARTIES TO NEGOTIATE A "NEW RECIPROCAL JOINT USE AGREEMENT."

The Order directs AT&T and DEP to "negotiate a new reciprocal joint use agreement."[76] AT&T, claiming that the Order is ambiguous and that the Bureau lacks authority to "order a wholesale revision of the JUA," argues that the Commission should clarify that the parties "*only* need to amend the JUA to include the new lawful rate provision—and do *not* need to negotiate a whole new joint use agreement."[77] AT&T's arguments are a smoke screen for its real objective—to reap a massive rate reduction while retaining the enormous competitive benefits of the JUA.

As explained in Section II *supra*, the material benefits AT&T enjoys under the JUA are not free. They impose real, quantifiable costs on DEP. If DEP can recover no more than the Old Telecom Rate for AT&T's attachments, then DEP quite literally cannot afford to provide AT&T with the full range of benefits that AT&T currently enjoys under the JUA. For example, if the going-forward net annual rental payment to DEP is reduced from approximately [redacted] to

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[75] *Teleport Comms. Atlanta, Inc. v. Ga. Power Co.*, Order on Review, File No. PA 00-005, 17 FCC Rcd 19859, 19869 at ¶ 25 (Oct. 9, 2002) (citing 47 U.S.C. § 224(e)(2)).

[76] Order at ¶ 64(b).

[77] AT&T's Application at 21 (italics in original).

approximately [redacted], then DEP cannot allow AT&T to retain its rights under the "tabulated costs" provision of the JUA. Under this provision, AT&T saves (and DEP incurs) [redacted] every time DEP performs a pole replacement on AT&T's behalf.[78] If AT&T were to request 500 replacements of DEP poles in a given year (i.e., less than 0.5% of the 148,064 jointly used poles owned by DEP), then DEP would be required to absorb [redacted] in pole replacement costs—i.e., well in excess of the annual net rental payment DEP would receive from AT&T.

The Commission adopted the Old Telecom Rate as a "reference point" (and later as a "hard cap") because it "help[ed] account for particular arrangements that provide net advantages to [ILECs] relative to cable operators or telecommunications carriers."[79] It had nothing to do with cost recovery, and the Commission has never found that the Old Telecom Rate fully reimburses electric utilities for the actual costs they incur in providing ILECs with competitive advantages under joint use agreements. This is why the Commission decided to "leave it to the parties to negotiate the appropriate rate **or tradeoffs to account for such additional benefits**."[80] Because the "rate" DEP can charge for AT&T's attachments is no longer on the table, it was entirely appropriate for the Bureau to direct the parties to negotiate "tradeoffs" to account for AT&T's newly reduced rate. To put it bluntly, if the most DEP can charge AT&T is around [redacted]/pole, then some of the "goodies" in the JUA—and especially the "tabulated cost" provision—must come out.

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[78] *See supra* Section I.E.4; *see also* DEP's Answer at Exh. A, DEP000256 (Freeburn Decl. ¶ 24). This does not account for the fact that AT&T also pays "tabulated costs" for "set and sell" poles. This saves AT&T (and costs DEP), on average, [redacted] per pole. *See id.* at Exh. A, DEP000256-57 (Freeburn Decl. ¶ 25). Between 2009 and 2017, DEP replaced 1,119 defective AT&T poles. *See id.* This means that DEP absorbed approximately [redacted] under the "tabulated cost" provision for replacing defective AT&T poles during that nine-year period (about [redacted]/year). *See id.* If history is any guide, "set and sell" poles under the "tabulated cost" provision would also take a large chunk out of AT&T's net rental payment to DEP each year.

[79] 2011 Order, 26 FCC Rcd at 5337, ¶ 218; *see also* 2018 Order, 33 FCC Rcd at 7771, ¶ 129 n.483.

[80] 2018 Order, 33 FCC Rcd at 7771, ¶ 128 (emphasis added).

AT&T's opposition to negotiating a new reciprocal joint use agreement also undercuts the main thrust of AT&T's complaint—i.e., that the JUA does not provide AT&T with competitive advantages over other attaching entities. AT&T has maintained throughout these proceedings that it derives no value or advantages from the JUA (including but not limited to the right to pay "tabulated costs" for make-ready pole replacements).[81] Despite ascribing no value to these provisions, AT&T is now seeking to retain them all. AT&T cannot have it both ways. The "rate" under the JUA is inextricably intertwined with benefits AT&T is afforded thereunder. For this reason, the Bureau's Order properly recognizes that the parties must be permitted to negotiate "tradeoffs" to accommodate AT&T's newly reduced rate.

CONCLUSION

For the reasons set forth above, the reasons set forth in the Bureau's Order, as well as the reasons previously stated in DEP's answer, declarations, documentary evidence and briefing, the Commission should deny AT&T's application for review.

Dated: November 5, 2021

Respectfully submitted,

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[81] *See, e.g.*, AT&T's Application at 8-15.

CERTIFICATE OF SERVICE

I hereby certify that on this day, November 5, 2021, a true and correct copy of Duke Energy Progress, LLC's Opposition to AT&T's Application for Review was filed with the Commission via ECFS and was served on the following (service method indicated):

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